IN ARBITRATION PROCEEDINGS PURSUANT TO THE CURRENT COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of Arbitration	)	
	)	
between	)	
	)	OPINION AND DECISION
CITY OF FRESNO	)	
	)	OF
and	)	
	)	PAUL D. STAUDOHAR
FRESNO CITY EMPLOYEES ASSOCIATION	)	Arbitrator
	)	C.S.M.C.S. Case No. ARB-00-435
Grievance of ROSE MIRANDA and LORI TIGSON	)	
	)	

APPEARANCES:

FOR THE ASSOCIATION

THOMAS M. SHARPE, ESQ.
Bennett & Sharpe
925 "N" Street, Suite 150
Fresno, California 93721

FOR THE CITY

HOWARD A. SAGASER, ESQ.
Sagaser, Franson & Jones
2445 Capitol Street, 2nd Floor
Fresno, California 93717

This is an arbitration to determine whether two employees are entitled to additional reimbursement for use of their personal vehicles on employer business. The Parties to this arbitration are CITY OF FRESNO (hereinafter called "City") and FRESNO CITY EMPLOYEES ASSOCIATION (hereinafter called "Association").

The Arbitrator was appointed by letter of March 6, 2001, from the California State Mediation and Conciliation Service, having been mutually selected by the Parties from a list. A hearing was conducted on May 18, 2001, at the offices of Counsel for the City, 2445 Capitol Street, Fresno, California. Testimony was received under oath from two Association witnesses and three City witnesses, who were submitted to full examination and cross examination by Counsel. Six joint exhibits, seven Association exhibits, and 16 City exhibits were introduced into the record. Post-hearing briefs were received by June 19, 2001.

Case Background

Rose Miranda and Lori Tigson (hereinafter identified individually or as "Grievants") are employed by the City as Risk Analysts in the Department of Administrative Services. A substantial amount of their time is spent on investigations conducted in the field, gathering information from witnesses, insurance adjustors, and attorneys. As a result, they frequently use their personal vehicles while conducting City business.

Since 1991 the City has had four different policies concerning transportation allowances. These policies all provide four categories of employees for purposes of vehicle use and reimbursement. Categories 3 and 4 are of special interest in this case. Fundamentally, Category 3 employees are expected to use their personal vehicles.

They receive a mileage reimbursement plus a monthly stipend (originally $80 a month, currently $90). Category 4 employees do not get the monthly stipend. They are expected to use vehicles from the City's motor pool, but if it is necessary to use their personal vehicles they receive a somewhat higher mileage reimbursement rate than employees in Category 3.

Over the years since 1991 the criteria for determining which category an employee should be placed in have changed. Specifically, from 1991 to 1996 the criteria for Category 3 included employees whose job required "frequent daily travel between crews or work sites, but does not require frequent off-hours travel." These employees were expected to use their personal vehicles for travel on City business. Category 4 employees were those who "must occasionally travel to conduct official City business," and who were expected to use pool vehicles when available.

Beginning on October 15, 1996, a revised policy was put into effect, which included in Category 3 employees "whose assignment includes full-time duties requiring the employee to drive more than 50 percent of the normal work schedule between crews or sites, but does not require frequent off-hours travel." These employees were expected to use their personal vehicles, and justification for an extra allowance was established in terms of a "minimum of 100 miles of City business use per month." Category 4 employees were expected to use either their assigned vehicles or vehicles from the motor pool, and if these were unavailable they would be reimbursed for use of their personal vehicles.

Another revised policy was set forth on December 1, 1998, but it remains essentially the same as the 1996 policy as regards Categories 3 and 4. Then, on February 15, 2000, the policy was revised again. The criteria for inclusion in Category 3

reverted back to the 1991 language, i.e., employees who "frequently travel between crews or work sites, but does not require frequent off-hours travel." The policy continues to contemplate use of personal vehicles by employees in Category 3. Category 4 is essentially unchanged.

Rose Miranda was hired in 1994. At this time she met with her supervisor, William Griever, to discuss job duties. Because field work was involved, she would be using her car for travel and needed to have the insurance limits required by the City. Miranda completed forms that showed her insurance coverage at $100,000 per individual, $300,000 per accident, and $50,000 property damage, fulfilling the requirements for Category 3. (Category 4 requirements provided lower limits of $15,000/$30,000/$15,000.) She told Griever that she already had this coverage on her vehicle. The Risk Safety Manager at the time, a Mr. Somsen, told Ms. Miranda that she would be in Category 3, and this is how she was initially placed. However, a short time later Miranda was moved to Category 4. Soon after she submitted a mileage form to Somsen, she was told (in about February or March 1994) that she would get a mileage reimbursement but not a monthly stipend. This would be consistent with her classification in Category 4, for employees using their personal vehicles, and Miranda did not grieve her status.

Lori Tigson was employed as a Risk Analyst in 1995, having previously worked for the City in other jobs since 1985. She filled out the necessary forms on vehicle reimbursement and met with Supervisor Griever and Ms. Miranda. Ms. Tigson had to increase her car insurance coverage to bring it up to the level required by the City. She was classified in Category 4 and did not object to this. It was made known to her that she would be using her own car, not a pool car.

Early in 2000 Miranda was trying to locate a form to renew information concerning vehicle mileage reimbursement. She was told that the form might be available on the City's Internet site, and while making this search she discovered the revised (as of February 15, 2000) policy on transportation allowance. After reading the policy she concluded that she and Tigson were eligible for Category 3 and the monthly stipend of $90.00. They met with both Griever and the Risk Safety Manager, Dan Turner, and were told that they needed to supply mileage records. After doing so, Miranda and Tigson were placed in Category 3, as of May 1, 2000.

Subsequently, Miranda and Tigson met with Turner to discuss payment of the monthly stipend retroactively to the dates of their initial employment as Risk Analysts. Turner asked them to make this request in writing, which they did on May 24, 2000. The City, however, would not pay the monthly stipend retroactively because the request lacked timeliness and would not have been allowed under City policy in any event, based on the number of miles driven.

This prompted Miranda and Tigson to file a grievance on August 2, 2000. Miranda is claiming reimbursement of $6,110.00, and Tigson is asking $4,980.00, based on monthly stipends not received.

Provisions of the Memorandum of Understanding

The following provisions of the Parties' negotiated agreement are especially relevant:

I. PROCEDURES FOR DISPUTE RESOLUTIONS

1. GRIEVANCE PROCEDURE

a. A grievance is a dispute concerning the interpretation or application of any existing City policy, * * * written rule or regulation governing personnel practices or working conditions, including this MOU. A grievance involves the claimed misapplication or misinterpretation of a rule or regulation relating to an existing right or duty; it does not relate to the establishment or abolishment of a right or duty. This procedure shall not apply to any dispute for which there is another established resolution procedure, including but not limited to, appeal to the Civil Service Board, Retirement Board, unfair employer-employee relations charge, fact-finding procedure, or as outlined below.

b. A written grievance must set forth the rule, regulation, policy, or * * * specific section of the MOU claimed to have been violated, describe the specific incident or circumstances of the alleged violation, and specify the remedy sought. Any dispute between the parties as to the grievability of an issue or as to whether the requirements of this procedure have been met shall be presented to the Grievance Advisory Committee. The Committee shall rule on the dispute before proceeding with the hearing. The Committee will be bound by the agreement of the parties regarding timeliness.

c. The Association may represent employees covered by this MOU on grievances under the grievance procedure.

d. Association Officers and Directors designated under Article IV Section B of this MOU shall be excused without loss of compensation from their regular duties for such time as is necessary to attend and represent Association members at grievance hearings, beginning at the first level of supervision.

e. The procedure and sequence in filing and processing a grievance shall be as follows:

1. The employee or his/her representative shall discuss the grievance with the employee's immediate supervisor before a written grievance may be filed.

(a) If the grievance is not settled through this discussion, it either may be discussed with the next higher supervisor or a written grievance may be filed with the employee's immediate supervisor. A written grievance must be filed, with a copy being sent to Labor Relations, within * * * eighteen (18) calendar days from the time the employee becomes aware, or should have become aware of, the issue or incident giving rise to the problem.

(b) Upon receipt of a written grievance, the immediate supervisor shall give the employee a written reply within * * * ten (10) calendar days.

2. Should the employee not be satisfied with the answer received from his/her immediate supervisor, the employee may, within * * * seven (7) calendar days, file an appeal to the Department Head. The Department Head shall have * * * ten (10) calendar days after receipt of the appeal to review the matter, investigate and provide a written answer to the appeal, explaining clearly his/her decision or proposed action and reasons thereof. The Department Head may confer with the employee and appropriate supervisors in an attempt to bring about a harmonious solution.

3. The City and Association may mutually agree to waive steps (1) and (2) and proceed directly to hearing by the Grievance Advisory Committee when the issue is one over which the employee's supervisor or Department Head has no jurisdiction.

4. If the employee is not satisfied with the decision of the Department Head, he or she may, within * * * seven (7) calendar days after receipt of the written reply, file a request for a review of the Department Head's decision to the Grievance Advisory Committee. The appeal to the Grievance Advisory Committee shall be reviewed by the Association before it is delivered to the Labor Relations Division.

5. The City and Association may agree to seek resolution of the grievance through mediation using the services of the State Conciliation Service, prior to hearing by the Committee. Time limits for processing of the grievance are automatically extended for as long as mediation is in process.

6. * * * The Grievance Advisory Committee shall be comprised of three (3) members: One selected by the Association, one selected by the City, and the Chairperson. The Chairperson may be chosen either by mutual agreement of the Association and the City, or by the "strike" method from a list of neutrals provided by the State Mediation and Conciliation Service. If the Chairperson is selected by the strike method from the list of neutrals provided by the State Mediation and Conciliation Service, then the Grievance Advisory Committee shall be comprised exclusively of the selected neutral.

Fees and expenses of the chairperson shall be paid half by the City and half by the Association; provided, however, that the Committee may recommend that the City or the Association pay the total of such fees and expenses should it find that, but for the unreasonableness of that party's posture, the convening of the Committee would not have been necessary. The City and the Association shall select a chairperson within * * * fourteen (14) calendar days of the receipt of a grievance request-

ing review by a Grievance Advisory Committee by the Labor Relations Division.

Position of the Association

In its post-hearing brief, the Association contends, on arbitrability, that doubts on the interpretation of contractual time limits should be resolved against forfeiture of the right to be heard on the merits of the grievance. Although the contract provides for filing grievances within 18 calendar days of the time the employee became aware of the incident, the Grievants had no knowledge of the "issue giving rise to the problem" until 2000. Both Grievants are said to have testified that it wasn't until Miranda found the transportation allowance policy on the Internet that it was realized such a document existed.

It is not unreasonable, argues the Association, for the Grievants to accept the representations of their supervisors regarding qualification for the Category 3 stipend. This is said to be the case even if it now appears that the managers' understanding of the policy was mistaken.

The Association cites two main theories in support of its position: (1) that the Grievants qualified for Category 3 at all times pertinent, and (2) although the Grievants were placed in Category 4, neither of them received the benefit of that classification. On the first point, the Association notes that the Grievants' vehicle use has not changed substantially during their employment. They satisfied the 100-mile per month requirement for Category 3. They are also said to have spent more than 50 percent of their time driving between crew and work sites, construing the 50 percent to refer to time away from the office rather than time spent driving the vehicle. Also, the Grievants are alleged to have spent more time in the field than other employees

who were classified as Category 3.

On its second main theory, the Association notes that Category 4 states that employees are to use pool vehicles when available, and otherwise to use personal vehicles. But the Grievants were required to use their personal vehicles regardless of the availability of pool vehicles. As a result, the Grievants used their personal vehicles more than was contemplated by Category 4. If they had been in Category 3—expected to use their personal vehicles—the monthly stipend would have been provided for additional wear and tear on their vehicles. It is also pointed out that Tigson had to increase her insurance coverage to comply with Category 3 requirements.

Citing the grievance procedure of the MOU, Article 11.1.6, the Association contends that the City should be required to pay the Arbitrator's fee. Its rationale is that the City made arguments that it knew were without merit. For instance, contends the Association, the City assumed there were 25 working days in a given month for purposes of its calculation, which is erroneous.

As a remedy, the Association seeks that the Grievants be made whole for losses sustained on the City's travel allowance reimbursement.

Position of the City

In its post-hearing brief, the City notes that at all times both Miranda and Tigson knew that they were classified in Category 4 and yet no grievance was ever timely filed. Because the MOU contains clear time limits for filing a grievance (18 calendar days) and there was a five or six year delay in this case, the grievance should be dismissed. There is no "continuing violation" says the City. Because the first written complaint from the Grievants came on May 24, 2000, the farthest back they

would be entitled to compensation would be May 6. Yet, notes the City, the Grievants were already being compensated under Category 3 as of May 1.

Referring to the testimony of Kay Hartman, Senior Human Resources Analyst, the City's transportation allowance policy was accessible to employees simply by asking the City Clerk for a copy, and it was available for the last three years on the Internet. Also, Griever and Turner are said to have testified that the policy was available in the Grievants' immediate work area.

As to the policies in effect prior to February 15, 2000, the City notes the requirement that employees spend 50 percent of their normal work schedule driving, and that they use the vehicle at least 100 miles per month. Testimony is cited in support of the view that neither of the Grievants met the 50 percent requirement. Also, for both employees, there is alleged to be several months in which the 100 mile minimum was not met.

The City contends that the Grievants' claims of detrimental reliance and increased insurance coverage fail to retroactively qualify them for Category 3 status. Both employees are said to have had insurance policy limits in excess of those required by Category 4, in Miranda's case from the outset and in Tigson's case from the time she applied for the Category 4 allowance. Thus, the insurance issue is misleading because the Grievants had voluntarily purchased the higher coverage.

Reference is made to the City's attempt to resolve the issue by offering to allow retroactivity under Category 3 to February 15, 2000, even though the Grievants did not file a written statement until May 24, 2000. This is said to be reasonable because the Grievants failed to sustain the burden of proof by being so long tardy in filing a claim and not meeting the criteria for Category 3 over the years.

As an attachment to its brief, the City presents several pages of Elkouri and Elkouri's *How Arbitration Works*, fifth edition, edited by Marlin M. Volz and Edward P. Goggin (Washington, D.C.: The Bureau of National Affairs, Inc., 1997). These pages (274-283) refer to compliance with time limitations.

Opinion

The Parties were unable to stipulate to the issues, leaving them for the Arbitrator to decide. According to the Association, the issues are:

1. Did the City improperly classify Grievant Rose Miranda for purposes of private vehicle use mileage reimbursement from March 1, 1994, to April 30, 2000?

2. Did the City improperly classify Grievant Lori Tigson for purposes of private vehicle use mileage reimbursement from July 1, 1995, to April 30, 2000?

3. Did the City act unreasonably in not resolving this dispute prior to the convening of the Grievance Advisory Committee? If so, what shall be the remedy?

4. If the answer to any of the above questions is in the affirmative, what shall be the remedy?

According to the City, the issues are:

1. Is there a timely Grievance before the Arbitrator for either Rose Miranda or Lori Tigson regarding their claims for extra compensation under the City's Transportation Allowance and Mileage Reimbursement Policy;

2. Was Rose Miranda entitled to reimbursement under Category 3 of the policy prior to May 1, 2000;

3. Was Lori Tigson entitled to reimbursement under Category 3 of the policy prior to May 1, 2000; and

4. Did any party act unreasonably in not resolving the dispute prior to the convening of the Grievance Advisory Committee?

These statements of issues are both accurate and reflective of the essence of the dispute and highlight legitimate areas of inquiry. A brief summary of the issues can thus be stated as: (1) Was the grievance timely filed and (2) Assuming that the answer to Issue 1 is in the affirmative, is either or both of the Grievants entitled to reimbursement under the City's Transportation Allowance policies?

As indicated in the Procedures for Dispute Resolution of the MOU, Section 1.6, if the Chairperson of the Grievance Advisory Committee is selected through the strike method provided by the California State Mediation and Conciliation Service, the Committee shall be comprised solely by the Chairperson. Because the Arbitrator/Chairperson was selected from the C.S.M.C.S. list, there is only one member of the Committee. It should also be noted that the MOU provides only advisory authority to the Arbitrator, so that the decision in this case is not binding on either Party.

As to the timeliness issue, arbitrators can be expected to deny a grievance if there has been a negligent delay in asserting a claim in timely fashion. If so, the grievance would lack procedural arbitrability and would be rejected short of any determination on the merits. In the instant case, there is a clear limit of 18 calendar days for filing a grievance. But this is conditioned by the proviso that this is "from the time that the employee becomes aware, or should have become aware of, the issue or incident giving rise to the problem."

There is no doubt that both of the Grievants knew they were classified in Category 4 years before they formally took issue with the City. There is also no question that the Transportation Allowance policies were available to them. But is it reasonable to assume that they would have realized the nature of the issue giving rise to the claim? There are reasons to conclude that they would not.

Although the Grievants knew they were in Category 4, the explanation of what this entailed was provided to them by their supervisors. They were not given a copy of the policy to read or interpret for themselves. The explanation of the policy was that they would need certain vehicle insurance liability coverage and would be using their own vehicles. While Miranda already possessed the needed insurance coverage, Tigson had to increase her liability coverage limits. Both Grievants understood that they were not to use vehicles from the motor pool unless their own vehicle was out of action. They did, on infrequent occasions, use pool cars when their vehicles were being serviced.

What is confusing here is that the expectation for Category 4 is that motor pool vehicles would be used. It is Category 3 that provides for predominant use of personal vehicles. So, while the Grievants were placed in Category 4, they were functioning as though they were in Category 3. They were following the advice of supervisors without question. Not being provided with the policy, it is fair to assume they perceived no reason to grieve. Although the policies were available, it is unlikely that they would pursue their review, having been already provided with instructions from their supervisors.

It was not until Miranda accidentally found the policy on the Internet, while searching for another item, that she realized something was amiss. Following this discovery, she and Tigson called the situation to management's attention. The City placed the Grievants in Category 3 as of May 1, 2000, and shortly thereafter the question of retroactivity was raised orally with Mr. Turner. When Turner asked for something in writing, the Grievants wrote their May 24 memo.

The grievance concerns the retroactivity question, not the placement in Cate-

gory 3 as such, so that when the issue became clear to the Grievants they acted expeditiously in calling it to management's attention. It is true that the formal grievance was not filed until August 2, 2000, but the City was on notice of the nature of the Grievant's claim in May, and there were informal discussions and written communications between them and their supervisors in the interim. It is therefore concluded that the timeliness requirements of the MOU were met.

Turning to the merits, it is noted that the policy in effect from the time the Grievants started work as Risk Analysts (1994 for Miranda, 1995 for Tigson) was the 1991 policy (Joint Exhibit 3). This policy states for Category 3 that employees "require frequent daily travel" and contemplates use of personal vehicles. There is no doubt that the Grievants traveled frequently on a daily basis. Read in light of the Category 4 description, which refers to employees who "occasionally travel" and who are anticipated to use pool vehicles, it is apparent that the Grievants were misclassified. They should have been in Category 3 and receiving the monthly stipend in addition to the mileage reimbursement.

The rationale for this is not only the clear intent of the policy but also the fact that the Grievants were using their own vehicles, which were subject to wear and tear as a result of the extra driving on City business. If they were using cars from the pool, their own cars would have been idle during the period of travel on City business.

But on October 15, 1996 the policy changed (Joint Exhibit 4). The criteria changed from simple frequent travel to driving more than 50 percent of normal work schedule between locations and a minimum of 100 miles a month. The 50 percent requirement is somewhat puzzling, because it could be interpreted as being away

from the office in the field half the time, or actually being in the car commuting between locations. Turner testified that the 50 percent means actual driving time. His interpretation is not necessarily inconsistent with the policy, and his testimony is unrebutted.

Yet, it seems incongrous when considered with the 100 mile minimum. The Association points out in its post-hearing brief that if an employee were to average a mere 15 miles per hour during 20 hours of work (50% of the workweek) the employee would have traveled 300 miles, thus tripling the monthly standard. Also, Turner, who was classified as a Category 3, testified that he traveled less than the Grievants did on City business. Nonetheless, the language of the policy supports the City's view.

What about the 100 mile minimum requirement? Although both Miranda and Tigson averaged more than 100 miles a week, the evidence shows that there were several months in which each employee did not reach the minimum (Association Exhibit 4). It is therefore concluded that the Grievants did not meet the criteria of Category 3 for the period from October 15, 1996 to November 30, 1998. Also, because the revised policy that took effect on December 1, 1998 was essentially unchanged, the Grievants would not quality for Category 3 during the life of that policy either, which ended on February 14, 2000. Thus, they are not entitled to the monthly stipend from October 15, 1996 through February 14, 2000.

On February 15, 2000 the new and current policy returned to the "frequent travel" standard for Category 3 (Joint Exhibit 6). Based on the fact that the Grievants do frequently travel on City business, using their own vehicles, they would be entitled to the increment for this period from its inception until they were placed in Category

3 on May 1, 2000.

Decision

After careful consideration of all written and oral evidence presented by the Parties, the following is provided on an advisory basis:

1. The Grievants should be paid the monthly stipend for Category 3 from the beginning of their employment as Risk Analysts until October 14, 1996, and from February 15, 2000 through April 30, 2000.
2. Because there is no evidence that either Party acted unreasonably in connection with the grievance, it is appropriate that they divide the Arbitrator/Chairperson's fee equally.

The grievance is sustained in part.

Paul D. Staudohar
Arbitrator/Chairperson

July 11, 2001